88-1364

Supreme Court, U.S.
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No _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PIERRE A. AVERETTE,
SHIRLEY A. AVERETTE,
Petitioners,

v.

TRIPLE CREEK CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE GEORGIA SUPREME COURT

Pierre A. Averette
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Duluth, Georgia 30136
(404) 476-8273

Shirley A. Averette
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Pro se Petitioners

55p

QUESTION PRESENTED

1. Were the Petitioners denied their First Amendment right to freedom of speech by the issuance of an injunction enforcing private restrictive covenants amended to restrict the particular speech being practiced by Petitioners?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Pierre A. Averette and Shirley A. Averette and the respondent Triple Creek Corporation. John Tata was a separate appellee in the court below; since Mr. Tata has withdrawn from this action and the original claim, he is not named as a party herein.

With the exception of Mr. Tata, the parties before this Court remain the same.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PIERRE A. AVERETTE,
SHIRLEY A. AVERETTE,
Petitioners

v.

TRIPLE CREEK CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

The petitioners Pierre A. Averette and Shirley A. Averette respectfully pray that a writ of certiorari issue to review the judgment of the Georgia Supreme Court affirming the order of the Gwinnett Superior Court, entered in the above-entitled proceeding on September 29, 1988.

OPINIONS BELOW

The opinion of the Georgia Supreme Court has not been reported. It is reprinted in the appendix hereto, APP. 1, infra.

The order of the Gwinnett Superior Court has not been reported. It is reprinted in the appendix hereto, APP. 2, infra.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on September 29, 1988, affirming the order of the Gwinnett Superior Court dated November 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, 1st Amendment:

Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

U.S. Constitution, 14th Amendment, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.

STATEMENT OF THE CASE

On February 7, 1984, Restrictive Covenants relating to the Charleston Bay Development were filed by Triple Creek Corporation (hereinafter referred to as "Respondent"); these covenants, filed at Page 337, Book 2715, Gwinnett County Georgia Records, included, in pertinent part, language restricting sign usage to a single "For Sale" sign. APP. 12.

Petitioners, Pierre A. Averette and Shirley A. Averette (hereinafter referred to as "Petitioners") subsequently purchased a home in the Charleston Bay Development. Petitioners were among several homeowners who made claims against the Respondent for uncompleted "Punch-List" repairs and problems discovered after closing.

Although claims were made, the claims of the Petitioners remained unresolved. Thus, in April, 1986, Petitioners placed, on their property, a single sign which stated "For Sale by Dissatisfied Owner." On March 31, 1987, the Respondent filed a Complaint in the Superior Court of Gwinnett County, styled Triple Creek Corporation v. Pierre A. Averette, Shirley A. Averette and John F. Tata, Civil Action File Number 87-A-1239-1, and a Motion for Interlocutory Injunction. These documents alleged that the Petitioners' sign was in violation of the Restrictive Covenants. Respondent sought relief by demanding the issuance of an Interlocutory Injunction prohibiting, thus ordering the removal of, Petitioners' sign. The Petitioners

filed an Answer and Counterclaim to the Superior Court complaint, Civil Action File Number 87-A-1239-1, on April 30, 1987; an Amended Counterclaim was filed by Petitioners on May 27, 1987.

After arguments were presented by both parties at a hearing held by the Gwinnett Superior Court on June 17, 1987, but before the court ruled on the injunction request, Respondent filed a Supplemental Statement, on July 23, 1987, showing an amendment of the restrictive covenant at issue in the litigation. APP. 13. This supplemental statement, in pertinent part, incorporated a copy of an Amendment to Declaration of Covenants and Restrictions for Charleston Bay that changed the language of the Covenants and Restrictions to include:

Signs bearing any expression of protest of dissatisfaction of any kind or nature (including but not limited to signs reading 'For Sale by Dissatisfied Owner') are strictly forbidden.

Respondent amended the Covenants by using the procedure outlined in Section 11.02 of the Declaration of Covenants and Restrictions for Charleston Bay, September 29, 1987. This section allows amendments that have been approved by a majority of the current homeowners. APP. 16.

Petitioners filed an Opposition to the Supplemental Statement on August 3, 1987, arguing, as they did during the Rule Nisi hearing on June 17, 1987, that the sign constituted a form of constitutionally protected expression; thus, Petitioners raised a First

Amendment defense. Petitioners claimed an absence of due process in the Covenant Amendment process, thereby negating restrictions of a Constitutional magnitude sought to be imposed. Further, Petitioners argued that the supplemental statement eliminated the original complaint, since the specific language of the Restrictive Covenants in controversy had been altered.

On September 4, 1987, Petitioners filed a Motion to Dismiss. On September 18, 1987, Respondent amended the Complaint to incorporate the amended covenant. A second hearing was held on September 24, 1987, during which irregularities became apparent with the adoption of the earlier Amended Covenants. The Petitioners, again,

reiterated their First Amendment and due process defenses. The Superior Court made no ruling on Respondent's request for the Interlocutory Injunction but granted an extension of the discovery period through December 31, 1987. On September 29, 1987, Respondent filed a Second Supplemental Statement, containing yet another set of Amendments to the Restrictive Covenants. APP. 13. Subsequent to the filing of the Second Supplemental Statement, the Superior Court of Gwinnett County issued a Non-Final Order, on November 5, 1987, granting the Interlocutory Injunction. APP. 2.

On November 16, 1987, the court issued a Certificate of Immediate Review, and Petitioners filed a Petition for Discretionary Review on November 25,

1987, with the Supreme Court of Georgia.

Respondent responded to the Petition for Discretionary Review on December 7, 1987. On this same date, the American Civil Liberties Union for Georgia gave notice of its intention to file an amicus curiae brief. The Petitioners' Notice of Appeal was filed on December 23, 1987, and the Supreme Court for the State of Georgia docketed the case on March 16, 1988, after receiving the entire record, including transcripts from all hearings, forwarded by the Gwinnett Superior Court Clerk.

After briefs were submitted by both parties herein, the decision of the Supreme Court for the State of Georgia was handed down on September 29, 1988, holding, in case 45586, AVERETTE et al v. TRIPLE CREEK CORP., "Judgment

affirmed without opinion pursuant to Georgia Supreme Court Rule 59. All the Justices concur." APP. 1.

The federal questions sought to be reviewed herein were raised by Petitioners' counsel in the court of first instance and in the appellate court. In the court of first instance, the questions sought to be reviewed were raised by Petitioners in their argument before the Superior Court during the hearings of June 17, 1987, and September 24, 1987. Petitioners, further, raised the questions on review herein in their pleadings, namely, the Opposition to Respondent's supplemental statement in support of its Motion for Interlocutory Injunction.

REASON FOR GRANTING THE WRIT

The decision below that purchasers

of real property subject to amendable restrictive covenants have thereby surrendered or can subsequently surrender their First Amendment right to freedom of speech conflicts with applicable decisions of this Court.

Petitioners claim abridgment of their First Amendment right to freedom of expression. Petitioners acknowledge that the right sought to be protected is not one held against private parties; but rather, reliance upon the First Amendment or the Fourteenth Amendment, the latter by incorporation into the First, will only provide protection against governmental intrusions. Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976); Columbia Broadcasting System, Inc. v Democratic National Committee, 412 U.S. 94, 114 (1973); Blum v.

Yaretsky, 457 U.S. 991, 1002 (1982); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

In Shelley v. Kraemer, this court found state action in judicial enforcement of private property restrictive covenants prohibiting sale of affected property to blacks. The cases and law review articles following Shelley have sought to explain, limit or expand the "state action" holding there. On one extreme, any resort to state courts, as fora where differences could be resolved and which provide a body of common law dispute resolution doctrines, could automatically be seen as state action. The other extreme would limit Shelley only to situations involving

racial discrimination.[1]

The District of Columbia Circuit, in an action by a landlord for recovery of possession of a month-to-month leasehold, reviewed post-Shelley cases

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[1]In Edwards v. Habib, discussed infra, the D.C. Circuit reviews Justice Black's interpretation that the doctrine applies only where, as in Shelley, the court is called upon to upset a transaction between a willing buyer and a willing seller; the footnote also quotes Professor Pollak: "The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the State could not itself have ordained. The principle underlying the distinction is this: The Fourteenth Amendment permits each his personal prejudices and guarantees him free speech and press and worship, together with a degree of free economic enterprise, as instruments with which to persuade others to adopt his prejudices; but access to state aid to induce others to conform is barred." Edwards v. Habib, 397 F.2d 687, 691-2 n. 10 (1968), citing: Pollack, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959).

cases and concluded that there could be no further doubt that the application by the judiciary of a state's common law may constitute "state action," even in a lawsuit between private parties, and that such state action must then conform to the same "constitutional strictures" which limit governmental action. Edwards v. Habib, 397 F.2d 687, 691 (D.C. Cir. 1968). See also Gresham Park Community Organization v. Howell, 652 F.2d 227 (5th Cir. 1981), where the court, interpreting Georgia law, declined to order state enforcement.

The "constitutional strictures" applicable to government in a First Amendment freedom of expression setting may be found in reviewing ordinance cases, involving zoning or specific prohibition statutes. It is clear that

a municipality may not prohibit the posting of "For Sale" or "Sold" signs to stem the flight of white homeowners from a racially integrated community. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977).

In State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980, the defendant, in violation of a sign ordinance, erected a sign which stated: "WELCOME!! PROSPECTIVE RESIDENTS OF LAWRENCE BROOK GLEN. THIS RESIDENT AND OTHERS OF RIVA AVE. WANT TO WELCOME YOU TO THIS FLOOD HAZARD AREA. GOOD LUCK!! INFORMATION AVAILABLE." The Supreme Court of New Jersey held that, although certain signs were allowed, the ordinance improperly restricted a residential property owner from free political speech. In summary, the court condoned restrictions designed

to further aesthetics, preserve property values, and promote traffic safety, as long as political speech was exempted from the restriction.

Respondent seeks to restrain dissemination of information which, in Respondent's sole view, is not legitimate information. This Court, in striking down a locality's content-based sign restriction ordinance, was concerned with the prevention of access to information, which related to one of the most important decisions to be made by individuals, where to live and raise their families. This Court would justify such repression only in an emergency. Linmark Associates, Inc., 431 U.S. 85; Whitney v. California, 274 U.S. 357 (1927). Petitioners contend that Respondent has claimed no such

emergency.

Use of the word "dissatisfied" does not affect aesthetics, property values, or traffic safety. Use of this word in the "For Sale by Dissatisfied Owner" sign is the Petitioners' method of expressing themselves honestly to prospective buyers.

By finding state action, the question becomes "whether the particular state action in the particular circumstances determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action." Edward v. Habib, 397 F.2d at 695, quoting Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 So. Cal. L. Rev. 208, 209

(1957).

The Order entered by the Superior Court concedes that the decision to grant the injunction was made only after Respondent amended the restrictive covenants twice and was not based upon the Covenants extant on the date when Petitioners purchased their homes. APP. 4-6, 16. The act of amending the restrictive covenants to include, specifically, the language of Petitioners' signs within the ambit of proscribed uses and conduct within the subdivision, without Petitioners' knowledge or consent to an amendment is ineffective to extinguish the rights of freedom of speech, due process of law, and the entitlement of equal protection of the laws.

The two attempts made by Respondent

to amend the restrictive covenants were performed without notice to or consent from the Petitioners. In an Ohio case concerning a condominium association's Board of Trustees' decision to enter upon the premises of a unit against the Owner's wishes to spray for roaches, the Ohio court sought reasonableness and imposed a Shelley-type inquiry to determine whether the decision or rule of the association was discriminatory or even-handed. The Ohio Court of Appeals, in explaining the need for the inquiry, stated that ". . . it protects against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable or unfair to the minority because its effect is to isolate and discriminate against the minority. It provides a safeguard

against a tyranny of the majority." River Terrace Condominium Association v. Lewis, 33 Ohio App. 3d 52, 514 N.E.2d 732, 737 n. 8 (1986).

The determination of whether there has been an effective waiver of federal constitutional rights is governed by federal standards. Boykin v. Alabama, 395 U.S. 238 (1969). To constitute a valid waiver, the applicable standard is that the waiver must be an intentional relinquishment or abandonment of a known right or privilege. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Whether a waiver meets the above standard of being "knowing, voluntary and intelligent" depends upon the particular facts and circumstances surrounding each case.

It is also well-settled that

federal and state courts will indulge every reasonable presumption against the waiver of fundamental constitutional rights, and this Court will not presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458 (1937). Significantly, this Court has also determined that purported waivers of First Amendment rights in particular must be examined with special scrutiny and will be inferred only in "clear and compelling" circumstances. Curtis Publishing Co. v. Butts, 388 U.S. at 145.

The waiver of constitutional rights will be carefully scrutinized by the courts even in the context of "voluntary," private agreements between private parties. For example, in Fuentes v. Shevin, 407 U.S. 67 (1972),

the appellants purchased household goods pursuant to conditional sale contracts which authorized the sellers to repossess the merchandise upon the appellants' failure to pay. This Court determined that the language of such contracts did not result in a waiver of the appellants' procedural due process rights to notice and a hearing prior to repossession. The Court stated that a contractual waiver of a constitutional right "must, at the very least, be clear." Id., 407 U.S. at 95. The Court added that "(w)e need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." Id.

It defies belief that the content

of an amendment adopted only after the filing of litigation, and after two hearings seeking judicial enforcement, was in the contemplation of the Petitioners when purchasing their properties almost three years earlier. APP. 16. Petitioners do not believe that the Gwinnett Superior Court's opinion intended such an over-broad assertion. The only remaining conclusion, however, is that the court concluded that Petitioners did contemplate, and intended to subject themselves to, any future amendments whatsoever to the covenants; and Petitioners knowingly waived all rights as federal citizens and the protection under the Bill of Rights by taking property subject to amendable covenants. Unfortunately, the latter conclusion is

no more reasonable or supportable than the former.

Beyond doubt, had the covenants been amended to prohibit sale to blacks, those amended covenants could not be enforced. Shelley v. Kraemer, 334 U.S. 1. There is no reason to believe that review of race-neutral actions under the First Amendment should be more limited than civil rights cases under the Fourteenth. This Court has long held that a right can be deemed secured by the Constitution even though only governmental interference with the exercise of the right is all that is being prohibited by the Constitution. Logan v. U.S., 144 U.S. 263, 293 (1892). This rule of law has been extended to apply to a purely private action brought to obtain libel damages. New York Times

Co. v. Sullivan, 376 U.S. 254 (1964). Unlike Shelley v. Kraemer, the Sullivan case did not involve a discriminatory contract violative of the Fourteenth Amendment. The State of Alabama through its courts and law provided a dispute resolution mechanism. Yet this Court held a libel judgment against the newspaper there violated the New York Time's First Amendment rights as incorporated under the Due Process clause of the Fourteenth Amendment. Id., 376 U.S. at 265. Here, the Georgia courts have provided the forum and, in framing the issue as "contractual waiver of rights," the court has clearly applied this state's common law in arriving at its decision.

The test applied in cases where government seeks to restrict First

Amendment freedoms is the paramount nature of the governmental interest, and whether that interest is of vital importance to the governmental function. Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir.), reh'g denied, 716 F.2d 914 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984).

Restrictions on free speech must be narrowly drawn to avoid restraining protected rights. Police Department of Chicago v. Mosley, 408 U.S. 92, 101 (1972); Carroll v. President and Commissioners of Princess Anne, 3393 U.S. 175, 183-184 (1968); Coates v. City of Cincinnati, 402 U.S. 611 (1972); Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Yet the unlimited reading given to the amended provision of the

Charleston Bay Covenants by the Gwinnett Superior Court implies that no such limitation exists on judicial enforcement of free speech infringement between private parties. If it is conceded that displaying signs, such as those in the present action, is a protected communication, it is also clear that privately initiated actions which abridge First Amendment freedoms and rely upon state enforcement must be subject to the balancing of constitutional rights of property owners against free speech rights. Marsh v. State of Alabama, 326 U.S. 501, 509 (1946). In such a balance, the First Amendment rights occupy a preferred position. Id.

If government may not abridge First Amendmen t rights absent a compelling

state interest, Petitioners submit that private parties amending a restrictive covenant to limit those same freedoms face an insurmountable burden, unless the content of the amendment has been specifically assented to in advance.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APP. 1

In the Supreme Court of Georgia

Decided: September 29, 1988

45586. AVERETTE et al v. TRIPLE CREEK CORP.

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justices concur.

APP. 2

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

TRIPLE CREEK CORPORATION,

Plaintiff,

CIVIL ACTION

VS.

FILE NO. 87 A 1239 1

PIERRE A. AVERETTE, SHIRLEY A. AVERETTE, ROBERT H. FORD, PATRICIA G. FORD, AND JOHN F. TATA

Defendants.

ORDER

Plaintiff having made application for an interlocutory injunction in this cause and a hearing having been held on said application on June 17, 1987, and on September 24, 1987, with all parties present and counsel for both parties presenting oral argument, it appears to the Court that the defendants are currently in violation of the Declaration of Covenants and

Restrictions for Charleston Bay as amended on September 29, 1987, by their display of signs upon their property which are prohibited by Section 7.06 of said Declaration of Covenants and Restrictions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds that the defendants are the owners of property in the Charleston Bay Development in Duluth, Georgia. The property was purchased from the plaintiff developer subject to restrictive covenants. Section 7.06 of the Covenants originally provided that a property owner was restricted to placing a single "FOR SALE" sign on his property on a temporary basis while the property was for sale. The Covenant did not further describe the nature of the

permitted "FOR SALE" sign. In April of 1986, the defendants erected and have since maintained on their respective properties a sign which reads "FOR SALE BY DISSATISFIED OWNER." On March 31, 1987, the plaintiff filed an action with this Court for injunctive relief alleging that the defendants' signs were causing substantial damage to the plaintiff's property interest remaining in the subdivision.

The Court finds that a hearing was held on this matter on June 17, 1987, wherein the defendants contended that their signs did not violate the literal terms of Section 7.06 and that their signs were a form of constitutionally protected expression. At that hearing, the Court expressed its own concerns regarding the specificity of the

language of Section 7.06 as it pertained to the defendants' signs. The Court took the matter under advisement and made no ruling on the plaintiff's request at that time. On July 23, 1987, the plaintiff filed and recorded an amendment to the Covenants which deleted the original Section 7.06 and in its place substituted a new Section 7.06 which contained language specifically prohibiting the use of defendants' signs.

The Court finds that a second hearing was held on this matter on September 24, 1987, wherein the defendants contended that the amendment to the Covenants was invalid and reiterated their first amendment defense. The Court received evidence at that hearing with respect to the manner

in which the Covenant was amended and expressed its concern that the amendment was not properly notarized in accordance with §O.C.G.A. 45-17-6(a) (1), 45-17-8(c). The Court made no ruling on the plaintiff's request for the injunction at that time. On September 29, 1987, the plaintiff filed and recorded a re-executed amendment, which again amended Section 7.06 of the Covenants.

The Court finds that the language of Section 7.06 as amended on September 29, 1987, expressly prohibits the defendants from maintaining their "FOR SALE BY DISSATISFIED OWNER" signs upon their property. The amendment was executed by the Declarant Charles Dean and a majority of the current property owners in accordance with Section 11.02 which provides for amendment of the

Covenants. The amendment appears to the Court to have been properly attested and notarized and is accorded the presumption of regularity. Hausen v. Ownes, 132 Ga. 648, 658 (1909). Neither Section 11.03 of the Covenants nor Section 9.01 negate the Declarant's and majority property owners' ability to amend Section 7.06 at the present time as contended by the defendants.

The Court finds that the defendants' first amendment defense under the facts of this case is distinguishable from Pittman v. Cohn Communities, Inc., 240 Ga. 106 (1977), in that Pittman did not involve restrictive covenants. Whether the restrictive covenant implicates the defendants' constitutionally protected expression turns on the issue of

contractual waiver of rights. One may waive a constitutional protection, provided it is done with knowledge and intent. Senters v. Wright & Lopez, Inc., 220 Ga. 611 (1965). The defendants purchased their property with knowledge of the then existing restriction on their use of any sign other than a single "FOR SALE" sign. The defendants could not by their own agreement erect any other sign on their property which may have also exhibited some form of protected communication. As the defendants state in their brief, they "did not contemplate the waiver of their freedom of expression as long as they met the "For Sale" requirement." (Defendants' Post Rule Nisi Hearing Brief, page 4). The defendants therefore imply they did contemplate a

waiver of their rights to the extent necessary to comply with the covenant governing signs. Because of the amendment, the "FOR SALE" sign requirement has been changed, and the defendants are no longer in compliance. Whether the defendants were or were not a party to that amendment is irrelevant to the issue of waiver. They purchased their property subject to the plaintiff's right to amend the Covenants with majority owner approval. By that action, defendants implicitly authorized plaintiff to amend the Covenant, and based on their own statements in brief, they intended a waiver of their first amendment rights in order to meet the literal requirements of the Covenant. Prior to the amendment, the defendants' first amendment argument was

strengthened by the law's unfavorable view toward implied restrictive covenants running with the land. See Ga. Real Est. Law, §19-180, 184 (3rd ed. 1986). The amendment of the Covenant has cured this problem, as the plaintiff now seeks to enforce an express Covenant which plainly prohibits the defendants' signs.

Based on the foregoing findings of fact and conclusion of law, it is hereby ORDERED that Defendants Pierre A. Averette, Shirley A. Averette, and John F. Tata are hereby restrained and enjoined from continuing to display "For Sale by Dissatisfied Owner" signs on any portion of the Charleston Bay Development, or any lot situated therein. It is further ORDERED that Defendants Pierre A. Averette, Shirley

A. Averette, and John F. Tata are hereby restrained and enjoined from erecting or maintaining on any portion of the Charleston Bay Development, or any lot situated therein, any sign other than a sign which conforms to the requirements of Section 7.06 of the Declaration of Covenants and Restrictions for Charleston Bay as amended on September 29, 1987.

This Order shall become effective immediately upon its issuance and remain in force until further Order of this Court.

This 5th day of November, 1987, 11:20 a.m.

ORDER BY JUDGE BRYANT HUFF

Gwinnett Superior Court

APP. 12

THE ORIGINAL 7.06 SECTION OF THE DECLARATION OF COVENANTS AND RESTRICTIONS FOR CHARLESTON BAY, FEBRUARY 7, 1984

7.06 Signs. Except as may be required by legal proceedings, no signs or advertising posters of any kind shall be maintained or permitted on any portion of the Development or any Lot situated therein, to include, but without limitation, a sign or signs, or any part thereof, placed within townhouse units visible from the exterior of the townhouse. Approval of name and address signs shall be upon such conditions as may be from time to time determined by the Architectural Standards Committee. Notwithstanding the foregoing, the restrictions of this Section 7.06 shall not apply to Declarant, its agents, representatives, and employees, during the period that Declarant has any Lot for sale. Nothing expressed herein to the contrary shall prevent one "For Sale" sign being erected on any Lot which may be erected by such Owner of said Lot or any Realty Company representing said Owner, but which sign may be maintained on such Lot on a temporary basis until such time as any such Lot and Townhouse Unit has been sold, when such sign shall be removed. No such "For Sale" sign shall be affixed to any permanent structure but shall be maintained on a temporary post or stand.

APP. 13

THE AMENDED SECTION 7.06 OF THE DECLARATION OF COVENANTS AND RESTRICTIONS FOR CHARLESTON BAY, SEPTEMBER 29, 1987

"7.06 Signs. (a) No signs of any kind (including but not limited to, commercial or advertising signs or posters) shall be installed, placed or maintained on any portion of the Development, or any Lot situated therein, or on or in any portion of any structure on any Lot which is visible from the exterior thereof, or on or in any vehicle, recreational or otherwise, trailer or boat situated on any Lot or on any portion of the Development except for signs which comply with the restrictions of Section 7.06 (b) below and come within one or more of the following six categories:

(i) such signs as may be required by law or by legal proceedings;

(ii) not more than one "For Sale" or "For Rent" sign; provided, however, such sign shall be maintained on the Lot on a temporary basis until such time as the Lot is sold or rented, as the case may be, when such sign shall immediately be removed and further provided that such sign shall bear no information other than information which ordinarily and

customarily is included in signs advertising the sale or rental of residential real estate;

(iii) directional signs for vehicular or pedestrian safety in accordance with plan and specifications approved by the Architectural Standards Committee;

(iv) small, unobtrusive window decals indicating the presence of any child or children for safety purposes;

(v) small, unobtrusive window decals indicating protection afforded by a burglar alarm or a security firm, or both;

(vi) such other signs as the Architectural Standards Committee shall approve in writing.

"(b) All signs located on the Development or any Lot situated therein shall be no larger than four square feet in area. All signs permitted pursuant to this Section 7.06 shall be professionally lettered and shall be securely and neatly affixed to a signboard, poster or stand and (except for signs permitted by Sections 7.06(a)(iv) and 7.06(a)(v) shall not be affixed to any permanent structure. No sign bearing any information which would cause embarrassment, discomfort, or annoyance to any owner(s) of any Lot or the Declarant shall be permitted. Signs bearing any expression of protest or

dissatisfaction of any kind or nature (including but not limited to signs reading 'For Sale By Dissatisfied Owner') are strictly forbidden. Signs bearing any expression disparaging or denigrating the value of any Lot or residence situated within the Development are strictly forbidden. Signs bearing any expression which would tend to have any adverse effect on the marketability of any Lot or residence situated within the Development are strictly forbidden."

11.02 Amendments of this Declaration by Declarant.

Declarant may amend this Declaration by an instrument in writing filed and recorded in the Office of Clerk of the Superior Court of Gwinnett County, Georgia, without the approval of any owner or mortgagee so long as Declarant owns any Lot primarily for the purposes of sale and so long as Declarant owns any of the property which is the subject matter of the Site Plan and that property more particularly identified under Article II, Plan of Development set forth hereinabove, provided, however that (i) in the event that such amendment materially alters or changes any Owner's right to the use and enjoyment of his Lot, such Lot's Appurtenant Easement Area, or Maintenance Easement rights as set forth in this Declaration or adversely affects the title to any Lot, such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby, or (ii) in the event that such amendment would materially and adversely affect the security title and interest of any mortgagee, such amendment shall be valid only upon the written consent thereto of all such mortgagees so affected. Any amendment made pursuant to this Section 11.02 shall be executed by Declarant (and by a majority of the then existing Owners and/or mortgagees under Section 11.02 (i) or (ii) if required) and shall be effective only upon recordation of such amended

Declaration in the Office of the Clerk of the Superior Court of Gwinnett County, Georgia, or at such later date as shall be specified in the amendment, itself, subsequent to the date of recording of such amended Declaration. Each Owner, by acceptance of a deed or other conveyance to a Lot, agrees to be bound by such amendments as are permitted by this Section 11.02 and further agrees that, if requested to do so by Declarant, such Owner will consent to the amendment of this Declaration or any other instruments relating to the Development (i) if such amendment is necessary to bring any provision hereof or thereof into compliance or conformity with the provisions of any applicable governmental statute, rule, or regulation or any judicial determination which shall be in conflict therewith, (ii) if such amendment is necessary to enable any reputable title insurance company to issue title insurance coverage with respect to any Lots subject to this Declaration, (iii) if such amendment is required by an institutional or governmental lender or purchaser of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to enable such lender or purchaser to make or purchase mortgage loans on any Lot subject to this Declaration, or (iv) if any such amendment is necessary to enable any governmental agency or reputable private insurance company to insure mortgage loans on the Lots subject to this Declaration.

(2)

Supreme Court, U.S.
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No. 88-1364

In The

Supreme Court of the United States

October Term, 1988

PIERRE A. AVERETTE and
SHIRLEY A. AVERETTE,

Petitioners,

v.

TRIPLE CREEK CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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8 pp

QUESTION PRESENTED

Does a state court's enforcement of private restrictive covenants governing the types of signs which may be erected on private property within a subdivision constitute impermissible state action in violation of the First Amendment?

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STATEMENT OF THE CASE

Respondent[1] accepts Petitioners' statement of the case as essentially correct. This case concerns a trial court's enforcement by interlocutory injunction of private restrictive covenants which, among other things, govern

[1] Respondent Triple Creek Corporation has no parent company. Nor does it have any subsidiaries (other than wholly owned subsidiaries) or affiliates. This statement is given in compliance with Rule 28.1 of the Supreme Court Rules.

the type of signs which may be erected on private property within a subdivision. APP. 2. The Supreme Court of Georgia, all justices concurring, affirmed the trial court without opinion. APP. 1.

REASONS FOR DENYING THE WRIT

1. The decision below does not conflict with any decision of this Court.

Petitioners have not cited any decision in which this Court has ever held that a state court's enforcement of a private agreement restricting freedom of speech constitutes impermissible state action in violation of the First Amendment. Nor is counsel for Respondent aware of any such decision.

It is well settled that a state court may not constitutionally enforce a private restrictive covenant which discriminates against black people on account of race. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court has not, however, extended the rationale of *Shelley* to prohibit private limitations on the exercise of free speech. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

In the *PruneYard*, *Hudgens*, and *Lloyd* cases the Court made clear that the First Amendment does not impair the right of a private property owner to restrict the speech permitted on his property. While these cases did not arise from the judicial enforcement of the property owners' rights, the Court's recognition of their rights would be meaningless if judicial enforcement were proscribed.

Therefore, it necessarily follows that a private property owner may resort to state courts for protection of his right to limit the exercise of free speech on his property without transgressing the First Amendment.

In this case private property owners within a subdivision agreed at the outset to restrictive covenants limiting the posting of signs within their subdivision. They also agreed to a means of amending those covenants[2] and later amended them.[3] While the Petitioners focus on the further limitations set forth in the amendment to the covenants, the amendment also expanded the types of permissible signs.[4]

Under this Court's rulings in the *PruneYard*, *Hudgens*, and *Lloyd* cases a single private property owner clearly may limit the posting of signs on his property as the covenants have done in this case. There is no reason that private property owners within a subdivision may not do the same by agreeing to restrictive covenants. Nor is there any reason to distinguish their situation from that of a single property owner's in determining whether judicial enforcement of the restrictions to which they have agreed constitutes state action for purposes of the First Amendment.

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[2] APP. 16.

[3] APP. 6-7.

[4] *Compare* APP. 12 *with* APP. 13-15.

2. The decision below is not a final judgment.

The Court lacks jurisdiction to grant the Petition for a Writ of Certiorari because it does not present a "Final [judgment or decree]." 28 U.S.C. § 1257. In this case the Supreme Court of Georgia merely affirmed the trial court's interlocutory injunction. Such injunctions are not final. 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice and Procedure* § 4009 at p. 575 (1977).

Indeed, this case presently is on a two-week trial calendar beginning March 27, 1989, and almost certainly will be tried prior to the conclusion of that calendar on April 7, 1989. In addition, the issue of permanent injunctive relief is currently the subject of a Respondent's motion for summary judgment, which may or may not be ruled on in view of the upcoming trial. In any event, the matter has not yet been finally determined even in the trial court.

Given the procedural posture of this case, review by this Court would be premature, and the Petitioners have stated no reason for review based on any of the Court's expanded finality rulings.

CONCLUSION

The Court should deny the Petition for a Writ of Certiorari to the Supreme Court of Georgia because the decision below does not conflict with any of the Court's

decisions and because it is not a final judgment or decree within the purview of 28 U.S.C. § 1257.

Respectfully submitted,

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